

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 150 OF 2005

SHRI JOAQUIM ANTONIO
MENDES(EXPIRED) AND ORS.,

....Appellants

Versus

MRS. ANGELINA MENDES AND 4 ORS.,

....Respondents

Shri Rohit Bras De Sa, Advocate for the Appellants.
Ms. R. Kamath, Advocate For Respondents

Coram:- D. D. SINHA, J.

Date:- 30th November, 2005

P.C.:

Heard Shri R. Bras de Sa, learned Advocate for the appellants and Ms. R. Kamath, learned Advocate for the respondents.

2. The appellants are the original plaintiffs in Regular Civil Suit No.201/1990/C which was filed for mandatory and permanent injunction against the respondents/original defendants. The suit was dismissed and therefore the appellants preferred first appeal which also came to be dismissed and hence the present Second Appeal.

3. The counsel for the appellants contended that in the year 1990 a suit was filed by the appellants on the basis of the said decree and the share received by the appellants in view of the preliminary decree. The Regular Civil Suit No.201/1990/C is against the defendants for permanent and mandatory injunction. It is therefore not in dispute that the portion which is given to the appellants in the decree of partition is the only portion which the appellants are entitled to protect from interference by the defendants. It is the case of P.W.1 who has deposed in her cross-examination that the claim in Regular Civil Suit No.201/90/C is

based on the certified copy of the plan (Exh.PW.1/A colly). It is on the basis of the said plan, P.W.1 has come to the conclusion that the respondents/defendants have encroached upon the plot in question. It is observed in the order of the lower appellate Court that her examination-in-chief shows that P.W.1 wants to prove this encroachment only on the basis of the plan (Exh.65) drawn by P.W.4. The plan (Exh.65) drawn by P.W.4 is on the basis of the plan at Exh.P.W.1/A Colly. It is further observed that the testimonies of P.W.4 and his son P.W.5 are totally shaken in cross-examination. According to P.W.4 his son (P.W.5) had done the tracing from the original plan to obtain certified copy. But P.W.5 says that he had never seen the original Plan (Exh.P-1/D-1). The angle formed between plots "A" and "B" if seen on the original plan (Exh.P-1/D-1) has a right angle of 90 degrees. But P.W.4 has denied that it is a right angle. P.W.4 avoided to measure that angle even after he was provided with the protactor. Exh.65 drawn by P.W.4 shows that the angle between plots A and B to be an obtuse angle. The testimonies of P.W.4 and P.W.5 therefore are not at all reliable and cannot prove any encroachment is the finding recorded by the lower appellate court after taking into consideration the evidence adduced by the parties and the judgment and finding recorded by the trial Court. If that is so, the concurrent findings recorded by the trial Court as well as the appellate Court, in my view, are just and proper and sustainable in law.

4. The appellants raised the following substantial questions of law:-

(a) Whether, Exh.PW1/A Colly, certified copy of the Judgment and Decree made in Special Civil Suit No.20/1984/B obtained by the Appellants eight days after Suit is decreed, is genuine, true and correct record of the judicial proceedings in the said Special Civil Suit No.20/1984/B ?

So far as this question of law is concerned, in view of the above referred finding it is apparent that the evidence adduced in the present suit is otherwise and it is on the basis of the evidence adduced by the parties the findings are recorded and therefore in my view the above referred

question is purely a question of fact which was considered by the Courts below in the light of the evidence adduced and therefore cannot be treated to be a substantial question of law.

The question of law raised in clause (b) for the same reason cannot be treated to be a substantial question of law. Similarly the substantial question of law raised by the appellants in clause (c) also cannot be treated to be a substantial question of law in view of the issues involved in the suit as well as the finding recorded by the Courts below.

Lastly the substantial question of law raised by the appellants in clause (d) also cannot be treated as a substantial question of law, particularly in view of the fact that there are no specific reasons forthcoming in what circumstances the appearance was withdrawn by the counsel for the appellants. In order to substantiate the contention, reliance is placed on the Judgment of the Supreme Court as reported in (2001) 4 S.C.C. 264. There is no quarrel with the proposition laid down by the Apex Court. However, in view of the evidence and the facts and circumstances involved in the present case and the findings recorded by the courts below, in my view, it is of no help to the appellants.

In that view of the matter, the appeal suffers from lack of merit. Consequently thesecond appeal is dismissed. C.A. is also dismissed.

D. D. SINHA, J.

sl.